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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 854

LORENE M. SWAIN, as Executrix of the Last Will and Testament of WILLIAM T. SWAIN, Deceased,

and

KATHRYN S. FREEMAN, as Administratrix of the Estate of EDGAR A. FREEMAN, Deceased,

and

RETA JEBERJAHN, as Executrix of the Last Will and Testament of FRED W. JEBERJAHN, Deceased,

and

DOROTHY G. JOB, as Executrix of the Last Will and Testament of HARRY C. JOB, Deceased,

and

MARION ANDERSON, as Administratrix of the Goods, Chattels and Credits of ARTHUR ANDERSON, Deceased,

Petitioners,

v.

BOEING AIRPLANE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below—Jurisdiction

Respondent accepts the identification of the opinions below and the statement of the grounds of jurisdiction of this Court contained in the petition.

Counter-statement of Questions Presented:

1. Did the Court of Appeals err in holding that the failure of the District Court to hear objections to the charge in the absence of the jury as required by Rule 51 of the FRCP did not require reversal in the absence of prejudice to petitioners' substantial rights within the meaning of the "harmless error" statute, 63 Stat. 110, 28 U.S.C. § 2111?

2. Did the Court of Appeals err in holding that petitioners' substantial rights were not prejudiced by the charge as given by the District Court?

3. Did the Court of Appeals err in holding that petitioners' substantial rights were not prejudiced by colloquy in the jury's presence regarding objections to the District Court's charge?

Rules and Statutes Involved:

In addition to Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C., and the "Harmless Error" statute, 28 U.S.C. § 2111, cited by petitioners, the case involves Rule 61 of the Federal Rules of Civil Procedure:

> "Rule 61. Harmless Error.
>
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Statement of Case

Petitioners sued for the wrongful death of five employees of American Airlines, Inc. ("American") who comprised the crew of an aircraft owned by American and manufactured by respondent ("Boeing"), which crashed during a training flight on August 15, 1959, near Calverton, New York.

There was no evidence of any malfunction of any equipment on the aircraft (Petition, p. 11).

Petitioners claimed:

(1) That the aircraft was inherently defective in design, having insufficient control capability to cope with a standard training maneuver involving simulated failure of two of the four engines, and that the alleged defect was the result of Boeing's negligence or breach of an implied warranty of fitness (Petition, pp. 5-6).

(2) That Boeing was negligent in failing properly to warn American regarding the aircraft's characteristics (Petition, p. 6).

The verdict for Boeing (App. 199a) was an implicit finding by the jury that petitioners had failed to establish that the accident was caused or contributed to by defective design of the aircraft or by any negligent failure of Boeing to warn of its characteristics.

There was substantial evidence to support the verdict. The aircraft had been duly certified as complying with the relevant requirements of the Civil Aeronautics Administration (App. p. 168a). It was capable of safely performing the "two-engine out" maneuver (Reedholm, App. 263a-264a). Boeing had fully informed American of its characteristics (Waddell, App. 275a, 294a-295a). American had accepted delivery of the aircraft only after flight testing it with regard to the characteristics now complained of (App. 305a-307a).

At the end of the evidence Boeing withdrew the affirmative defense of contributory negligence, there having been no positive evidence identifying which of the decedents were at the controls (App. 152a).

At the conclusion of the charge the trial court declined a request by petitioners' trial counsel to "approach the bench" and heard argument in the presence of the jury on certain objections to the charge as given and on requests for further instructions (App. 190a). Petitioners' counsel registered no objection at the trial to this procedure.

The Court of Appeals affirmed, holding that notwithstanding the withdrawal of the affirmative defense of contributory negligence "it remained for the jury to decide whether the plaintiffs had sustained their burden of showing that the crash was due to a defect rather than to negligent operation or some other cause for which the manufacturer would not be responsible" (Petition, p. 55).

The Court of Appeals expressed agreement with other circuits "that trial judges should be alert to further the important objective of the final sentence of Rule 51". It held, however, that even considering objections which had not been noted at the trial the charge gave no ground for reversal and that the colloquy in the jury's presence was not prejudicial (Petition, p. 56).

ARGUMENT

I. The case presents no novel or important question regarding the application of Rule 51.

It has been uniformly held that non-compliance with the letter of Rule 51 is not reversible error where no prejudice results.

Levin v. *Joseph E. Seagram & Sons, Inc.*, 158 F. 2d 55, 58, 7 CA, 1946;

Gwinnett v. *Albatross S. S. Co., Inc.*, 243 F. 2d 8, 9-10, 2 CA, 1957;

Hardigg v. *Inglett*, 250 F. 2d 895, 897, 4 CA, 1957;
Luther v. *Maple*, 250 F. 2d 916, 920, 8 CA, 1958;
Garland v. *Material Service Corp.*, 291 F. 2d 861, 863, 7 CA, 1961;
Swift v. *Southern Railway Co.*, 307 F. 2d 315, 320-1, 4 CA, 1962.

As these authorities illustrate, the requirements of Rule 51 are not excepted from the application of the "Harmless Error" statute, 28 U.S.C. § 2111, or of Rule 61.

The court below, for the purpose of its decision, accepted petitioners' contention that their counsel "was warranted in thinking that permission to take exceptions out of the hearing of the jury had been denied" and agreed that "judges should be alert to further the important objective of the final sentence of Rule 51" (Petition, p. 56). Accordingly it turned its attention to two questions: First, did the charge contain reversible error, whether or not sufficient objection was made? Second, was the colloquy held in the presence of the jury prejudicial to petitioners? If, as the court held, the trial record justified a negative answer to these questions, technical non-compliance could not have affected the substantial rights of the petitioners.

Respondent submits that this approach was harmonious with the plain meaning of Rule 51 when read in conjunction with 28 U.S.C. § 2111 and Rule 61 and with the interpretation placed upon Rule 51 by Courts of Appeals in the past.

II. The Court of Appeals held correctly that the petitioners were not prejudiced by the charge.

The only recorded exceptions were to the court's failure to charge petitioners' requests numbered 11 and 19 in the language requested (App. 190a-193a).

Requested instruction No. 11 read as follows:

> "11. I further charge you that evidence that this aircraft was safely operated on prior occasions is not evidence that negligence on the part of any of the decedents contributed to the crash" (App. 203a).

The requested instruction is supported by no cited authority and is contrary to elementary logic. As petitioners have stated, "The only conclusion which flows from prior safe use is that petitioners' decedents must have been negligent if other pilots safely executed the same maneuvers" (Petition, pp. 38-9).

Petitioners' attack was on the design of the airplane, there being no evidence of physical failure or malfunction of any part (Hogue, App. 44a). It was open to Boeing to resist this attack by showing that the occurrence did not compel the inference that the design was defective. In considering whether the largely unexplained accident might have been caused by some error of those operating the airplane, rather than by an alleged inherent design deficiency, the first question to occur is: Was the airplane of such a design that the maneuver in question could be performed without accident by crews of normal competence? No evidence could be more relevant to this question than the history of safe operation of this and identical airplanes on numerous occasions involving similar maneuvers.

Requested instruction No. 19, which the court declined to charge, was as follows:

> "19. Evidence of certification of this aircraft by the Civil Aeronautics Administration to show due care on the part of Boeing is not relevant to the issue of warranty and is not to be considered in determining whether or not the defendant breached its warranty of fitness" (App. 206a).

Under the court's charge the standard to be applied to the breach of warranty claim was one of reasonable fitness (App. 173a, 177a). Where breach of warranty is claimed solely on the basis that the design of the airplane is not reasonably fit for its intended use, approval of such design by the duly appointed federal authority is obviously just as relevant to the breach of warranty claim as to the claim of negligence. Logically the relevance of certification to the claim of negligent design is that it tends to prove the reasonableness of the design, the very point to be proved on the warranty issue. If, as apparently conceded, type certification is evidence of reasonable care in the design, it must necessarily be evidence that the design was reasonable.

In the Court of Appeals petitioners raised numerous objections to the charge which they contended they had not had proper opportunity to make at the trial. The court below held that petitioners might be relieved of the requirement that objections to the charge be sufficiently made. Examining the charge "in this light" it found no ground for reversal (Petition, p. 56).

Thus, affirmance was not predicated on the failure of counsel to make timely objection to the charge, but on the correctness of the charge as given.

The further objections to the charge first raised and considered on appeal and restated in the petition are without merit. In general they may be considered in three categories:

> 1. The asserted failure to charge that plaintiffs were entitled to recover if some breach of duty by defendant was a concurrent or contributing proximate cause of the accident.

The question of concurrent causes was fully dealt with in the main charge and in the court's supplementary instructions.

The court charged the jury:

> "The jury will have to consider whether a contributing cause of the accident was because of the negligence of Boeing in the design and manufacture of the plane; that is the first issue on liability." (App. 173a)
>
> • • •
>
> "In order to find a verdict for the plaintiffs, you must find that they have established by a fair preponderance of the evidence that the decedents were killed in this crash by an accident which was caused or contributed to by negligence on the part of Boeing, or by a breach of an implied warranty of reasonable fitness on the part of Boeing." (App. 177a)

In amplifying its main charge, at the request of petitioners' counsel, the court further stated:

> "What you are asking me to say there is something that I think I said in my charge, but if there is a doubt in your mind I will say it again, on the issue of negligence you do not have to find that the defendant's negligence was the sole cause of the crash. If you find that negligence was a contributing cause for the crash, then of course the negligence would create a cause of action in behalf of the plaintiffs.
>
> "In other words, it does not have to be the only thing that happened, but if negligence or breach of warranty was one of the causes of the crash, why, then, of course, the plaintiffs have made out their cause of action." (App. 191a)

This categorical instruction that "• • • if negligence or breach of warranty was one of the causes of the crash, why, then of course, the plaintiffs have made out their cause of action", removed any shadow of doubt as to whether petitioners had to go beyond proving that some breach of duty by Boeing merely contributed.

Later the court again stressed the same point when it said:

> "I mean, in order for the plaintiffs to recover they have to establish the contributing cause of the crash was a defect in the plane or a resultant negligence or breach of the implied warranty." (App. 193a)

Finally the following exchange took place between the court and petitioners' counsel:

> "Mr. Geoghan: In other words, your Honor did instruct the jury that if there were concurrent causes and one of them was negligence, then the verdict would be in favor of the plaintiff, and I request that in view of the discussion here about the operation of plane.
>
> The Court: I do not understand what you are driving at. I do not know what you want.
>
> Mr. Geoghan: Well, there has been a discussion here about the operation of the plane being the cause of this accident, and I just wanted to request again, if there are concurrent causes and one of them spells breach of warranty of [or] negligence—
>
> The Court: If a cause was the fault of Boeing, why Boeing can be liable.
>
> Mr. Geoghan: That is all." (App. 195a)

This was the court's final pronouncement on the subject. Counsel's remark "That is all" can only mean that he was content with it.

The passages of colloquy just quoted show that the court resolved, to counsel's avowed satisfaction, any possible uncertainty which may have been caused by the use of a permissive expression earlier in the charge, i.e., "you may determine that Boeing is liable." (App. 177a)

Relying upon *Kendrick* v. *Piper Aircraft Corp.*, 265 F. 2d 482, 3 CA, 1959, petitioners complain of the following

language appearing in the early portion of the main charge:

> "When damages in an accident are occasioned by one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, the plaintiffs are not entitled to recover unless there is affirmative evidence upon which the jury may reasonably conclude that more probably the damage was caused by the cause for which the defendant is responsible." (App. 171a)

This part of the charge plainly dealt with the question of distinct and separate causes, not with concurrent causes. In this context it was correct.

> 2. Instructions to the effect that if the accident were caused by negligent operation of the airplane petitioners were not entitled to recover.

Petitioners' argument that the court "revived" the defense of contributory negligence overlooks the fundamental nature of contributory negligence as an affirmative defense and the effect of its withdrawal.

As an affirmative defense, contributory negligence would have no pertinence unless it were first established that Boeing's negligence or breach of warranty was at least a contributing cause of the accident. To determine that issue it was necessary to consider whether (in the absence of more direct evidence of causation) the circumstances of the accident made it more probable that causation involved some breach of duty by Boeing than that it did not. Therefore petitioners had the burden of showing the relative improbability of alternate causes of the accident, suggested by the circumstances, for which Boeing was not responsible. As the New York Court of Appeals said in *Bourcheix* v. *Willow Brook Dairy, Inc.*, 268 N. Y. 1, 7: "When some other cause might have existed plaintiff is bound to exclude it."

A "contributory negligence" charge would tell the jury that even though it found that Boeing's negligence caused the accident, it must return a verdict for Boeing if it also found that decedents' negligence contributed. (See suggested charge Civ. 4.23, 28 F.R.D. 438.) The charge in the present case carried no such implication.

Petitioners persist in the fallacy that Boeing admitted that there was no negligence in the operation of the aircraft. The answers to interrogatories quoted at pages 9-10 of the petition are no more than denials of knowledge.

Boeing never admitted that there was no negligence in the operation of the plane. It admitted only that it could not prove which individual was negligent (App. 152a).

The withdrawal of the defense of contributory negligence meant only that if the jury found that the crash was caused both by a breach of duty by Boeing and by negligence of one or more decedent, petitioners would prevail.

If the jury were to find the crash could as readily as not be accounted for by negligent operation without any negligence or breach of warranty by Boeing contributing thereto, a verdict for Boeing must follow, not on the ground of contributory negligence but on the ground that plaintiffs had simply not sustained their burden of proof. The only "confusion" surrounding the contributory negligence issue was that generated by the failure of petitioners' counsel to appreciate this fact.

The Court of Appeals correctly stated:

> "But Boeing's withdrawal of the contributory negligence defense for lack of affirmative proof as to who was misusing the plane in no way conceded that the plane was not being misused; it remained for the jury to decide whether the plaintiffs had sustained their burden of showing that the crash was due to a defect rather than to negligent operation or some other cause for which the manufacturer would not be responsible." (Petition, p. 55)

A further fallacy is petitioners' statement that contributory negligence was "the only defense presented by Boeing" (Petition, p. 9). Boeing consistently denied that any negligence or breach of warranty on its part either caused or contributed to the accident. Denial of any causally related breach of duty is certainly a sufficient defense.

3. The asserted failure to charge adequately regarding the claim of negligent failure to warn.

The District Court charged:

> "It is the law, of course, that a manufacturer has a duty to adequately warn foreseeable users of its products of foreseeable and latent dangers attendant upon the proper and intended use of its product." (App. 170a)

Petitioners cannot show prejudice in connection with the alleged failure to warn because they proved no case on this point. There was no evidence that American, the purchaser, was ignorant of the relevant characteristics of the airplane. There was ample evidence that it was fully informed (Reedholm, App. 257a-258a; Waddell, App. 275a, 294a-295a). 'Where the vendee and user has actual knowledge of the characteristic complained of the manufacturer's alleged failure to warn cannot be the proximate cause of the loss. *McLaughlin* v. *Mine Safety Appliance Co.*, 11 N. Y. 2d 62, 1962.

III. The Court of Appeals held correctly that petitioners were not prejudiced by colloquy in the jury's presence regarding objections to the charge.

The court below also examined the record in the light of the question whether "there is reasonable basis for concluding that the colloquy had in the presence of the jury * * * was prejudicial" and concluded that there was not (Petition, p. 56).

The colloquy in question fills about six pages of the printed appendix (pp. 190a-196a). It contains at page 191a amplification of the main charge on the points of contributing cause and assumption of risk, rendered at the request of petitioners' counsel.

At pages 193a to 195a there is amplification of the point that if Boeing's breach of duty were merely a contributing cause, Boeing could be liable, this being the consequence of the withdrawal of the contributory negligence defense, whereas if the crash arose from causes independent of any breach of duty by Boeing, it would not be liable.

None of the colloquy significantly modified or affected the charge in chief. In tone and content it was sober, dispassionate and free of oratorical flights. At no time did petitioners' counsel intimate at the trial that he considered it prejudicial.

Respondent submits that the court below was correct in holding that the colloquy in question, freely participated in without objection by petitioners' counsel, did not prejudice their substantial rights.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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